Supreme Court, U.S.
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NO. 85-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GUISEPPE CASTORINA,
Petitioner

v.

LYKES BROS. STEAMSHIP CO., INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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I.

Reply Point: Lykes' assertions in point one of its response are not pertinent to the issue of a shipowner's tort liability. Rather, Lykes' cited authorities deal with longshoremen's compensation—a statutory remedy. The question before the Court does not concern compensation but whether the 1972 amendments to the LHWCA abrogated a maritime remedy for wrongful conduct that occurred prior to 1972.

It is fundamental that a party becomes subject to liability on the date when it commits wrongful acts. RESTATEMENT (SECOND) OF TORTS § 5 comment a (1965). Lykes committed wrongful acts, in its capacity as a ship-

owner, between 1965 and 1972 by providing unseaworthy vessels with raw asbestos loose in the holds. Castorina suffered "injury" when he inhaled the asbestos fibers. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973), *cert. denied,* 419 U.S. 869 (1974) (each exposure to asbestos may result in an additional and separate injury).

Lykes' reference to Section 28(g) of the 1984 amendments to the LHWCA is immaterial since the amendments were not effective until September 28, 1984, long after Castorina was injured. Moreover, the amendments do not change the definition of "injury" which embraces both the initial injury as well as any resulting occupational disease. 33 U.S.C. § 902(2) (1978). *Todd Shipyards Corp. v. Black,* 717 F.2d 1280 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 1910 (1984), was concerned only with computing an employee's average weekly wage to determine compensation benefits. It did not involve a shipowner's tort liability, nor did it decide whether pre-1972 or post-1972 law applied. Further, *Todd Shipyards* focused on the loss of future earning capacity, not on the past wrongful conduct of a shipowner. 717 F.2d at 1289. Similarly, by its own language the cited House Conference Report also concerns compensation. Conf. Rep. No. 1027, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 2771, 2780.

"[I]njury does not mean disability." *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952). "Disability" means incapacity or lack of ability to earn wages. 33 U.S.C. § 902(10)(1978). Significantly, Concress defined both "disability" and "injury" in the LHWCA, and its awareness of the difference is apparent throughout. *Pillsbury, supra,* 342 U.S. at 199.

Compensation provisions of the LHWCA and any case construing those provisions, such as *Todd Shipyards,* are concerned with disability and do not bear on the issue of damages for wrongful conduct. Those provisions do not apply to the definition of "injury" in determining a shipowner's liability. Rather, the cases cited previously by Castorina are closer aligned to the analysis required for such determination. *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir.), *cert. denied,* 454 U.S. 1109 (1981); *INA v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied,* 454 U.S. 1075 (1981). Those cases hold that a wrongdoer becomes subject to liability when the "injury"—inhalation of asbestos fibers—occurs.

II.

Reply point: The OSHA regulation in question, 29 C.F.R. § 1504.102(c)(1) (1965), should be applied to Lykes as shipowner since Lykes as shipowner created the hazard.[1] Lykes misapprehends the teachings of Castorina's cited authorities—that one employer must be held accountable for dangers which it has created and imposed upon another employer's workers. *American Petroleum Institute v. OSHA,* 581 F.2d 493 (5th Cir. 1978), *aff'd* 448 U.S. 607 (1980); *Beatty Equipment Leasing, Inc. v. Secretary of Labor,* 577 F.2d 534 (9th Cir. 1978).

Further, Section 1504.2(b) of the OSHA regulations places no additional responsibilities on vessel owners "unless such persons are acting as employers."[2] The clear import of this language is that if a vessel owner is also

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1. The regulation is quoted in Castorina's Petition at A-49.

2. This regulation is also quoted in Castorina's Petition at A-49.

acting as an employer of a longshoreman, the regulations do in fact place additional responsibilities on the vessel owner. This was recognized by the Fifth Circuit in *Brown v. Mitsubishi Shintaku Ginko,* 550 F.2d 331, 333 (5th Cir. 1977).

Finally, Section 1504.2(b) expressedly continued the effect of the law existing at the time the regulation was promulgated: "[N]or is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or *duties now placed upon them by law,* regulation, or custom." *Id.* Moreover, nothing in the 1972 amendments of the LHWCA changed the application of OSHA regulations in longshoring. There has been no statute or court opinion to change pre-1972 interpretations of negligence per se for regulatory violation. Consequently, the test found in *Marshall v. Isthmian Lines, Inc.,* 334 F.2d 131 (5th Cir. 1964), continues to apply. Indeed, the *Marshall* test has been applied since the 1972 LHWCA amendments in a case involving an OSHA regulation. *Arthur v. Flota Mercante Gran Centro Americana, S.A.,* 487 F.2d 561 (5th Cir. 1973).

Another significant case brought forward by Section 1504.2(b) is *Provenza v. American Export Lines, Inc.,* 324 F.2d 660 (4th Cir. 1963). Like *Marshall, Provenza* has been cited with approval by the Fifth Circuit in *Arthur, supra,* and in *Reyes v. Vantage SS Co., Inc.,* 558 F.2d 238 (5th Cir. 1977). *Provenza* teaches that OSHA regulations are binding on the shipowner where he knew or should have known of a violation of the safety regulations. Lykes argues that it, as shipowner, did not know that the condition was unreasonably dangerous. Unless

the regulation specifically requires knowledge, merely doing the proscribed act constitutes a violation. *Marshall, supra,* 334 F.2d at 134. The court below stated that "Lykes knew of the dusty conditions and knew that the men were not wearing respirators." 758 F.2d at 1036. Accordingly, Lykes, as shipowner, knew of the violation.

Lykes, as shipowner, created the hazard which injured Castorina; Lykes, as shipowner, bore additional responsibilities since it also acted as Castorina's employer; and Lykes, as shipowner, knew that its stevedoring arm was violating an OSHA regulation.

III.

Reply point: It would be inconsistent with Congress' concern for the safety of longshoremen to hold flatly that no shipowner owes a duty to longshoremen to comply with OSHA regulations. This concern will be ignored if a shipowner, merely by doing its own stevedoring, can escape liability for injuries caused by the hazard which it has created.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 21 day of August, 1985, three true and correct copies of the foregoing instrument were sent by regular mail to Mr. Ben L. Reynolds, Royston, Rayzor, Vickery & Williams, 205 Cotton Exchange Building, Galveston, Texas 77550.

_____

STEPHEN M. VAUGHAN